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8 **UNITED STATES DISTRICT COURT**
9 **NORTHERN DISTRICT OF CALIFORNIA**

10 SIDNEY NAIMAN, individually and) Case No.
11 on behalf of all others similarly situated,))
12 Plaintiff,)) **CLASS ACTION**
13))
14 vs.)) **COMPLAINT FOR VIOLATIONS**
15))
16 MERCHANTS BANCARD))
17 NETWORK, INC. and DOES 1 through) 1. NEGLIGENT VIOLATIONS
18 10, inclusive, and each of them,)) OF THE TELEPHONE
19)) CONSUMER PROTECTION
20)) ACT [47 U.S.C. §227(b)]
21))
22)) 2. WILLFUL VIOLATIONS
23)) OF THE TELEPHONE
24)) CONSUMER PROTECTION
25)) ACT [47 U.S.C. §227(b)]
26))
27)) **DEMAND FOR JURY TRIAL**
28))

Plaintiff SIDNEY NAIMAN (“Plaintiff”), individually and on behalf of all others similarly situated, alleges the following upon information and belief based upon personal knowledge:

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NATURE OF THE CASE

1. Plaintiff brings this action individually and on behalf of all others similarly situated seeking damages and any other available legal or equitable remedies resulting from the illegal actions of MERCHANTS BANCARD NETWORK, INC. (“Defendant”), in negligently, knowingly, and/or willfully contacting Plaintiff on Plaintiff’s cellular telephone in violation of the Telephone Consumer Protection Act, 47. U.S.C. § 227 *et seq.* (“TCPA”) and related regulations.

JURISDICTION & VENUE

2. Jurisdiction is proper under 28 U.S.C. § 1332(d)(2) because Plaintiff, a California corporation with its principle place of business also in California, seeks relief on behalf of a Class, which will result in at least one class member belonging to a different state than that of Defendant, a Florida Company. Plaintiff also seeks up to \$1,500.00 in damages for each call; in violation of the TCPA, which, when aggregated among a proposed class in the thousands, exceeds the \$5,000,000.00 threshold for federal court jurisdiction. Therefore, both diversity jurisdiction and the damages threshold under the Class Action Fairness Act of 2005 (“CAFA”) are present, and this Court has jurisdiction.

3. Venue is proper in the United States District Court for the Northern District of California pursuant to 28 U.S.C. § 1391(b)(2) because Defendant does business within the State of California and Plaintiff resides within the State.

PARTIES

4. Plaintiff, SIDNEY NAIMAN (“Plaintiff”), is a resident of California and is a “person” as defined by *47 U.S.C. § 153 (39)*.

5. Defendant, MERCHANTS BANCARD NETWORK, INC. (“Defendant”) is a credit card company and is a “person” as defined by *47 U.S.C. § 153 (39)*.

6. The above-named Defendant, and their subsidiaries and agents, are

collectively referred to as "Defendant." The true names and capacities of the Defendant sued herein as DOE DEFENDANTS 1 through 10, inclusive, are currently unknown to Plaintiff, who therefore sues such Defendants by fictitious names. Each of the Defendant designated herein as a DOE is legally responsible for the unlawful acts alleged herein. Plaintiff will seek leave of Court to amend the Complaint to reflect the true names and capacities of the DOE Defendants when such identities become known.

7. Plaintiff is informed and believes that at all relevant times, each and every Defendant was acting as an agent and/or employee of each of the other Defendants and was acting within the course and scope of said agency and/or employment with the full knowledge and consent of each of the other Defendant. Plaintiff is informed and believes that each of the acts and/or omissions complained of herein was made known to, and ratified by, each of the other Defendant.

FACTUAL ALLEGATIONS

1. Beginning in or around October 2017, Defendant contacted Plaintiff on Plaintiff's cellular telephone number ending in -5502, in an attempt to solicit Plaintiff to purchase Defendant's services.

2. Defendant used an “automatic telephone dialing system” as defined by *47 U.S.C. § 227(a)(1)* to place its call to Plaintiff seeking to solicit its services.

3. Defendant contacted or attempted to contact Plaintiff from telephone number (407)278-4614 confirmed to be Defendant's number

4. Defendant's call constituted a call that was not for emergency purposes as defined by 47 U.S.C. § 227(b)(1)(A).

5. Defendant's call was placed to telephone number assigned to a cellular telephone service for which Plaintiff incurs a charge for incoming call pursuant to 47 U.S.C. § 227(b)(1).

6. During all relevant times, Defendant did not possess Plaintiff's "prior

1 express consent" to receive call using an automatic telephone dialing system or an
2 artificial or prerecorded voice on its cellular telephones pursuant to 47 U.S.C. §
3 227(b)(1)(A).

4 7. Such call constitutes solicitation call pursuant to 47 C.F.R. §
5 64.1200(c)(2) as they were attempts to promote or sell Defendant' services.

6 8. Plaintiff never granted Defendant any prior express consent nor was
7 any established business relationship with Defendant in existence as defined under
8 16 C.F.R. 310.4(b)(1)(iii)(B).

9 9. Upon information and belief and based on Plaintiff's experiences of
10 being called by Defendant after requesting they stop calling, and at all relevant
11 times, Defendant failed to establish and implement reasonable practices and
12 procedures to effectively prevent telephone solicitations in violation of the
13 regulations prescribed under 47 U.S.C. § 227(c)(5).

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CLASS ALLEGATIONS

15 10. Plaintiff brings this action individually and on behalf of all others
16 similarly situated, as a member the four proposed classes (hereafter, jointly, "The
17 Classes"). The class concerning the ATDS claim for no prior express consent
18 (hereafter "The ATDS Class") is defined as follows:

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20 All persons within the United States who received any
21 solicitation/telemarketing telephone call from Defendant
22 to said person's cellular telephone made through the use
23 of any automatic telephone dialing system or an artificial
24 or prerecorded voice and such person had not previously
25 consented to receiving such call within the four years
prior to the filing of this Complaint.

26 11. Plaintiff represents, and are a member of, The ATDS Class, consisting
27 of all persons within the United States who received any collection telephone calls
28 from Defendants to said person's cellular telephone made through the use of any

1 automatic telephone dialing system or an artificial or prerecorded voice and such
2 person had not previously not provided their cellular telephone number to
3 Defendants within the four years prior to the filing of this Complaint.

4 12. Defendants its employees and agents are excluded from The Class.
5 Plaintiff do not know the number of members in The Class, but believes the Class
6 members number in the thousands, if not more. Thus, this matter should be
7 certified as a Class Action to assist in the expeditious litigation of the matter.

8 13. The Class is so numerous that the individual joinder of all of its
9 members is impractical. While the exact number and identities of The Class
10 members are unknown to Plaintiff at this time and can only be ascertained through
11 appropriate discovery, Plaintiff is informed and believe and thereon allege that The
12 Class includes thousands of members. Plaintiff allege that The Class members may
13 be ascertained by the records maintained by Defendant.

14 14. Plaintiff and members of The ATDS Class were harmed by the acts
15 of Defendants in at least the following ways: Defendants illegally contacted
16 Plaintiff and ATDS Class members via their cellular telephones thereby causing
17 Plaintiff and ATDS Class members to incur certain charges or reduced telephone
18 time for which Plaintiff and ATDS Class members had previously paid by having
19 to retrieve or administer messages left by Defendants during those illegal calls, and
20 invading the privacy of said Plaintiff and ATDS Class members.

21 15. Common questions of fact and law exist as to all members of The
22 ATDS Class which predominate over any questions affecting only individual
23 members of The ATDS Class. These common legal and factual questions, which
24 do not vary between ATDS Class members, and which may be determined without
25 reference to the individual circumstances of any ATDS Class members, include,
26 but are not limited to, the following:

27 a. Whether, within the four years prior to the filing of this
28 Complaint, Defendants made any telemarketing/solicitation

1 call (other than a call made for emergency purposes or made
2 with the prior express consent of the called party) to a ATDS
3 Class member using any automatic telephone dialing system or
4 any artificial or prerecorded voice to any telephone number
5 assigned to a cellular telephone service;

6 b. Whether Plaintiff and the ATDS Class members were damaged
7 thereby, and the extent of damages for such violation; and
8 c. Whether Defendants should be enjoined from engaging in such
9 conduct in the future.

10 16. As a person that received numerous telemarketing/solicitation calls
11 from Defendants using an automatic telephone dialing system or an artificial or
12 prerecorded voice, without Plaintiff's prior express consent, Plaintiff is asserting
13 claims that are typical of The ATDS Class.

14 17. Plaintiff will fairly and adequately protect the interests of the members
15 of The Class. Plaintiff has retained attorneys experienced in the prosecution of
16 class actions.

17 18. A class action is superior to other available methods of fair and
18 efficient adjudication of this controversy, since individual litigation of the claims
19 of all Class members is impracticable. Even if every Class member could afford
20 individual litigation, the court system could not. It would be unduly burdensome
21 to the courts in which individual litigation of numerous issues would proceed.
22 Individualized litigation would also present the potential for varying, inconsistent,
23 or contradictory judgments and would magnify the delay and expense to all parties
24 and to the court system resulting from multiple trials of the same complex factual
25 issues. By contrast, the conduct of this action as a class action presents fewer
26 management difficulties, conserves the resources of the parties and of the court
27 system, and protects the rights of each Class member.

28 19. The prosecution of separate actions by individual Class members

1 would create a risk of adjudications with respect to them that would, as a practical
2 matter, be dispositive of the interests of the other Class members not parties to such
3 adjudications or that would substantially impair or impede the ability of such non-
4 party Class members to protect their interests.

5 20. Defendants have acted or refused to act in respect generally applicable
6 to The Class, thereby making appropriate final and injunctive relief with regard to
7 the members of the Class as a whole.

8

9 **FIRST CAUSE OF ACTION**

10 **Negligent Violations of the Telephone Consumer Protection Act**

11 **47 U.S.C. §227(b).**

12 21. Plaintiff repeats and incorporates by reference into this cause of action
13 the allegations set forth in the paragraphs above.

14 22. The foregoing acts and omissions of Defendant constitute numerous
15 and multiple negligent violations of the TCPA, including but not limited to each
16 and every one of the above cited provisions of *47 U.S.C. § 227(b)*, and in particular
17 *47 U.S.C. § 227 (b)(1)(A)*.

18 23. As a result of Defendant' negligent violations of *47 U.S.C. § 227(b)*,
19 Plaintiff and the Class Members are entitled an award of \$500.00 in statutory
20 damages, for each and every violation, pursuant to *47 U.S.C. § 227(b)(3)(B)*.

21 24. Plaintiff and the ATDS Class are also entitled to and seek injunctive
22 relief prohibiting such conduct in the future.

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SECOND CAUSE OF ACTION

Knowing and/or Willful Violations of the Telephone Consumer Protection Act

47 U.S.C. §227(b)

On Behalf of the ATDS Class

25. Plaintiff repeats and incorporates by reference into this cause of action the allegations set forth in the paragraphs above.

26. The foregoing acts and omissions of Defendant constitute numerous and multiple knowing and/or willful violations of the TCPA, including but not limited to each and every one of the above cited provisions of *47 U.S.C. § 227(b)*, and in particular *47 U.S.C. § 227 (b)(1)(A)*.

27. As a result of Defendant' knowing and/or willful violations of 47 U.S.C. § 227(b), Plaintiff and the ATDS Class are entitled an award of \$1,500.00 in statutory damages, for each and every violation, pursuant to 47 U.S.C. § 227(b)(3)(B) and 47 U.S.C. § 227(b)(3)(C).

28. Plaintiff and the Class members are also entitled to and seek injunctive relief prohibiting such conduct in the future.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff requests judgment against Defendant for the following:

FIRST CAUSE OF ACTION

Negligent Violations of the Telephone Consumer Protection Act

47 U.S.C. §227(b)

- As a result of Defendant's negligent violations of 47 U.S.C. §227(b)(1), Plaintiff and the ATDS Class members are entitled to and request \$500 in statutory damages, for each and every violation, pursuant to 47 U.S.C. 227(b)(3)(B).

1 • Any and all other relief that the Court deems just and proper.
2

3 **SECOND CAUSE OF ACTION**

4 **Knowing and/or Willful Violations of the Telephone Consumer Protection**

5 **Act**

6 **47 U.S.C. §227(b)**

7 • As a result of Defendant' willful and/or knowing violations of 47
8 U.S.C. §227(b)(1), Plaintiff and the ATDS Class members are
9 entitled to and request treble damages, as provided by statute, up to
10 \$1,500, for each and every violation, pursuant to 47 U.S.C.
11 §227(b)(3)(B) and 47 U.S.C. §227(b)(3)(C).
12 • Any and all other relief that the Court deems just and proper.

13 **JURY DEMAND**

14 29. Pursuant to the Seventh Amendment to the Constitution of the United
15 States of America, Plaintiff is entitled to, and demands, a trial by jury.

16 Respectfully Submitted this 26th Day of May, 2020.

17 LAW OFFICES OF TODD M. FRIEDMAN, P.C.

18 By: /s/ Todd M. Friedman
19 Todd M. Friedman
20 Law Offices of Todd M. Friedman
21 Attorney for Plaintiff
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